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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RUDOLPH ROYBAL,

Petitioner,

vs.

KEVIN CHAPPELL, Warden of the
California State Prison at San Quentin,
Respondent.

Case No. 99cv2152-JM (KSC)

DEATH PENALTY CASE

**ORDER GRANTING
PETITIONER'S MOTION FOR
LEAVE TO FILE FIRST
AMENDED PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner filed a First Amended Petition ["FAP"] with the Court on June 17, 2013. (Doc. No. 215.) After the Court issued a revised briefing schedule,¹ on August 1, 2013, Petitioner filed a Motion for Leave to File a First Amended Petition ["Mot."], arguing that a first amended habeas corpus petition is necessary for a complete review

¹ The original scheduling order contemplated that Petitioner would file a Motion for Leave to Amend, along with the First Amended Petition, on or before June 17, 2013. (Doc. No. 214.) Petitioner filed the First Amended Petition on June 17, 2013, without a motion for leave to amend. After a July 12, 2013 status hearing with the Court, the parties met and agreed upon a revised briefing schedule, and the Court accordingly ordered that the Motion for Leave to Amend be filed on or before August 1, 2013, Respondent's Opposition be filed on or before September 17, 2013, and Petitioner's Reply be filed on or before November 1, 2013. (Doc. No. 219.)

1 of: (1) the claims initially filed with the Court on September 29, 2000, and (2) those
2 additional claims later raised and exhausted in case number S156846 before the
3 California Supreme Court. (Doc. No. 220 at 1, 8.)

4 On September 16, 2013, Respondent filed an Opposition ["Opp."]. (Doc. No.
5 225.) Respondent argues that: (1) the newly exhausted claims are untimely; (2) equitable
6 tolling is not available based on the Court's prior statements regarding stay and abeyance
7 or the conduct of prior counsel; (3) the majority of the newly-added claims do not relate
8 back to original petition; (4) amendment is futile with respect to several claims due to
9 procedural default; and (5) amendment is futile with respect to all of the new claims
10 because Petitioner cannot meet the standard for habeas relief under 28 U.S.C. § 2254.
11 (Opp. at 8-24.)² On November 1, 2013, Petitioner filed a Reply with accompanying
12 exhibits. (Doc. No. 239.) Petitioner contends that: (1) the amended petition is timely
13 because this Court indicated its intention to stay the initial petition pending the
14 exhaustion of state court remedies as to the new claims, and because the "egregious
15 facts" of this case justify equitable tolling, and (2) Respondent's request that the Court
16 deny several claims on the basis of procedural default, and deny the entire petition on the
17 basis of futility, is tantamount to a motion for summary judgment and requires additional
18 briefing prior to adjudication. (Reply at 7-41.)

19 The Court has thoroughly considered the pleadings, the attached exhibits, and the
20 procedural and factual history of the case. For the reasons discussed below, the Court
21 **GRANTS** Petitioner's Motion for Leave to file a First Amended Petition.

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28 ² In citing to the filings in this case, the Court will refer to the pagination assigned
by the Southern District's Electronic Case Filing ("ECF") system, in which all page
numbers are located on the top right-hand side of each document.

1 I. PROCEDURAL HISTORY³

2 On July 21, 1992, a San Diego County jury found Petitioner guilty of first-degree
3 murder, first-degree robbery and first-degree burglary in the in the death of Yvonne
4 Weden. (CT 2506-09.) As to each offense, the jury found true that Petitioner personally
5 used a knife, that he inflicted great bodily injury on the victim, and that the victim was
6 a person 60 years of age or older. (*Id.*) The jury also found true two special
7 circumstances, felony-murder robbery and felony-murder burglary. (*Id.*) On August 24,
8 1992, the jury sentenced Petitioner to death. (CT 2534-35.) The trial court denied
9 Petitioner's motion for a new trial and sentenced Petitioner to death on October 20, 1992.
10 (CT 2536-37.)

11 On January 24, 1996, attorney Barry Morris was appointed by the California
12 Supreme Court to handle Petitioner's direct appeal proceedings and state habeas petition.
13 On direct appeal, the California Supreme Court affirmed Petitioner's conviction and
14 sentence on November 12, 1998. See People v. Roybal, 19 Cal. 4th 481 (1998). On
15 January 13, 1999, the California Supreme Court denied the petition for rehearing. After
16 one extension of time, a petition for writ of certiorari was filed in the United States
17 Supreme Court on May 13, 1999, which was denied on October 4, 1999.

18 On October 5, 1999, Petitioner filed a motion for appointment of counsel in this
19 Court. On December 14, 1999, Elizabeth Barranco and Russell Babcock were appointed
20 as federal habeas counsel. On April 6, 2000, Barry Morris moved to be relieved as state
21 habeas counsel by the California Supreme Court, without filing a state habeas petition.
22 On June 16, 2000, Petitioner moved in this Court to equitably toll the deadline for filing
23 the federal habeas petition in light of the delay in receiving Petitioner's files and the
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25 ³ Unless otherwise stated, the procedural history recounted above was obtained
26 from this Court's electronic docket (case number 99cv2152) and the California Supreme
27 Court's docket with respect to Petitioner's direct appeal (case number S029453) and
28 state habeas petition (case number S156846). The Court takes judicial notice of the
proceedings before the California Supreme Court. See Fed. R. Evid. 201(b); see also
Fed. R. Evid. 1101 (e) (Federal Rules of Evidence apply to habeas corpus proceedings).
The California Supreme Court docket is available electronically at
<http://www.courts.ca.gov/supremecourt.htm>

1 disorganized state of those files, and at a hearing held on June 30, 2000, the Court denied
2 the request. The Court and parties agreed that the timely filing deadline for the federal
3 petition would be October 3, 2000. (Doc. No. 239-1 at 27, Ex. C to Reply.) With respect
4 to the filing of the federal Petition and pursuit of state remedies, the Court stated that:

5 I think that's the manner in which this case should proceed, that there
6 should be a filing of an exhausted federal habeas petition, that counsel at
7 that point, if they need to put a substantial amount of their focus and
8 attention on what's happening with the state petition, that they can turn
9 their efforts in that direction, deal with the California Supreme Court, seek
10 compensation there; but at least you'll have an exhausted petition on file
11 here. If it's necessary to stay that petition following the pursuit of a state
12 petition, then this Court will be ready, willing, and able to stay the federal
13 claim upon a showing of good cause; I would have no reluctance in doing
14 so.

15 (Id. at 63.) At the end of the June 30 hearing, the Court reiterated as follows: "The way
16 things stand right now, I'll expect to see an exhausted federal petition filed by October
17 3 unless I see a further motion come in." (Id. at 77.)

18 On July 31, 2000, federal counsel Barranco and Babcock filed a motion in the
19 California Supreme Court, requesting appointment as state habeas counsel. Both Mr.
20 Morris' motion to be relieved and Ms. Barranco and Mr. Babcock's motions for
21 appointment were denied by the California Supreme Court on August 16, 2000.

22 On September 29, 2000, federal counsel Barranco and Babcock timely filed a
23 federal habeas petition in this Court. The federal Petition contained a footnote indicating
24 in part that, "[p]ursuant to the ruling of this Court on June 30, 2000, petitioner alleges
25 herein only those claims previously exhausted in the courts of the State of California.
26 Petitioner intends to file a subsequent petition in this court should claims which have not
27 yet been adjudicated in the courts of the State of California be denied in that forum."
28 (Doc. No. 25 at 1, fn.1.) Respondent filed an Answer to the federal Petition on October
29 27, 2000, and on May 2, 2001, Petitioner filed a Traverse.

30 At a July 13, 2001 status hearing, the parties and the Court engaged in a discussion
31 that centered on the status of the state and federal court proceedings and explored
32 possibilities regarding federal funding for counsels' work. The Court indicated that

1 “ultimately you want to get a petition over here that’s complete, where all claims have
2 been exhausted, and to the extent that there are state claims that will ultimately be recast
3 as federal claims, then there is a need to ultimately get the case in that posture so that it
4 can get - - we can get moving on with this case, we can proceed to an evidentiary
5 hearing, and ultimately we can get this case ruled upon.” (Doc. No. 239-1 at 106, Ex. E
6 to Reply.) During the hearing, Respondent indicated that “we are not going to accept
7 what I assume is this Court’s implicit ruling that anything newly discovered at this point
8 in time or from this point in time into the future can in fact be presented to this Court and
9 ruled on on the merits.” (Id. at 113.) Respondent asserted that the federal case, as it
10 stood, “is ripe for decision.” (Id. at 114.) The parties also engaged in a lengthy
11 discussion on the Court’s ability to stay the case, the nature of the state proceedings
12 given the lack of a pending petition, and the impact of prior state habeas counsel’s failure
13 to timely file a state habeas petition. The Court commented that “[t]he underlying
14 circumstances in this case are most unusual.” (Id. at 126.) In response to Respondent’s
15 repeated assertion that the case was ready for decision, the Court stated:

16 Congress never could have contemplated this kind of a scenario, Ms.
17 Boustany [prior counsel for Respondent], with all due respect, and if you
18 can find me one case in the entire legislative history behind AEDPA that
indicates that Congress was contemplating this kind of an unusual
circumstance, I’d be very interested in having that cited to me.

19 (Id. at 153.)

20 On July 25, 2001, this Court ordered federal counsel to again seek appointment
21 in state court. On November 5, 2001, federal counsel moved to be appointed state
22 habeas counsel. On November 15, 2001, attorney Morris again moved to withdraw as
23 state habeas counsel. On December 12, 2001, the California Supreme Court granted
24 permission for Morris to withdraw and appointed Barranco and Babcock as state habeas
25 counsel. At a December 14, 2001 status hearing, attorney Barranco estimated that they
26 could have a state habeas petition on file by June 1, 2002. (Doc. No. 239-1 at 189, Ex.
27 G to Reply.) At a July 1, 2002 status hearing, attorney Barranco indicated a revision to
28 the schedule, estimated that she expected to submit a draft of the petition to the

1 California Appellate Project for review by August 1, and stated that she hoped to have
2 it filed with the California Supreme Court in September or October, 2002. (Doc. No.
3 239-1 at 196-98, Ex. H to Reply.) Between January and April 2003, the Court scheduled
4 and held several status conferences with counsel for Petitioner to discuss Petitioner's
5 representation, communication difficulties between co-counsel, and their communication
6 with Petitioner. (See Doc. Nos. 60-67, Ex. 37 to FAP.)

7 On May 21, 2003, this Court issued an order relieving attorney Babcock as
8 counsel of record and designating him "of counsel," and stating that Mr. Babcock "will
9 remain available for reappointment by the court as counsel of record in the event of
10 disability, incapacity, or other inability of attorney Elizabeth Barranco to serve as
11 counsel on this case in the future." (Doc. No. 68.) On or about June 4, 2003, the Court
12 received a letter from Petitioner, and, pursuant to Local Rules, forwarded the letter to
13 counsel for Petitioner. (Doc. No. 69.) In the letter, Petitioner stated that with Mr.
14 Babcock's removal as counsel "the Court has removed the only reliable representation
15 I have," and said that he and Ms. Barranco "have not seen eye to eye on issues related
16 to my appeal." (Id. at 2.) Petitioner stated that "I have tried to communicate with her,
17 to no avail. She refused to communicate with me concerning matters related to my
18 appeal. I have requested numerous time [sic] to be involved in the proceeding of my
19 case. I have heard more from this Court, then [sic] Mrs [sic] Barranco." (Id.) Petitioner
20 also stated that in the two times he spoke to her in person, "not once has she talked to me
21 about matters relating to my case." (Id. at 3.) Instead, Petitioner stated that Ms.
22 Barranco "has communicated to me facts of her personal life, that I have no interest in
23 and has nothing to do with my appeal. She hired someone to work on my case, then fired
24 them. This has been a topic of conversation for some time. In her communication of
25 late, she has expressed distrust in other's working on my appeal." (Id.) Petitioner
26 requested "assistance in finding an agreeable solution to this impasse. I want the Court
27 to be aware of the conflict between myself and Mrs [sic] Barranco." (Id.)

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1 On August 28, 2003, this Court ordered attorney Barranco to appear at a hearing
2 on September 3, 2003, regarding her continued representation of Petitioner, and
3 indicated that counsel “is strongly advised that her failure to appear may result in her
4 being relieved as counsel of record for petitioner.” (Doc. No. 70.) After attorney
5 Barranco failed to appear at the September 3, 2003 hearing, on September 4, 2003, the
6 Court set an order to show cause hearing for September 17, 2003 and again ordered
7 Barranco to appear, again advising her that “her failure to appear will result in her being
8 relieved as counsel for Petitioner.” (Doc. No. 72.) At the September 17, 2003 hearing,
9 the Court ordered Barranco to submit a written response to the order to show cause, and
10 set another hearing for October 21, 2003. On October 21, 2003, the Court withdrew
11 Barranco as counsel and substituted in attorney Babcock. (Doc. No. 75.)

12 At an October 23, 2003 hearing, attorney Babcock indicated his desire to remain
13 as second counsel on the case and to have a new primary counsel appointed. (Doc. No.
14 239-2 at 3, Ex. K to Reply.) He indicated that the case was now at “ground-zero,” and
15 stated that:

16 At one point there were approximately 60 to 70 banker’s boxes of original
17 documents that included notes of the attorneys, DNA material, exhibits,
18 investigative reports, and I don’t believe any of that material is any longer
19 extant. It was all stored at Ms. Barranco’s house, and my understanding
from when I went there with my investigator, the material has been
destroyed, that it was thrown out basically.

20 (Id. at 4.) He indicated that it would be “extremely difficult for counsel” going forward,
21 “because it’s going to involve trying to retrieve as much of these lost memories as
22 possible,” and opined that “a lot of this material will be never be able to be retrieved
23 because there was only one copy of those original notes.” (Id.) While he had been told
24 work was being done on the case, Babcock stated that “I don’t have any evidence that
25 any work was done over the past six to eight months on the case. I haven’t seen any
26 work product, I haven’t been provided any even though I repeatedly requested it.” (Id.
27 at 8.) When asked for details, Babcock stated that he was originally responsible for
28 organizing the files and delivering them to Barranco, and stated that:

1 My understanding was from a conversation I had with Ms. Barranco
2 in the presence of my investigator was she underwent an eviction process
3 at her home, and when she was being evicted from her home, the boxes
4 were left out in the rain, they were rained upon, and they were abandoned,
5 and basically at that point they were thrown out in the trash by another
6 individual, not herself. When I went to see her, that's what she indicated
7 to me.

8 Again, I'm indicating to the Court that I'm not talking about
9 transcripts, I'm not talking about cases; I'm talking about investigative
10 reports, I'm talking about photos from this man's life, basically his entire
11 life in these 40 boxes.

12 (Id. at 9.) Babcock also noted that while Barranco remained lead counsel before the
13 California Supreme Court, the deadline for filing a state habeas petition remained
14 pending, and was due in December 2003. (Id. at 13.) Babcock agreed to inform counsel
15 for Respondent of the current situation, and indicated plans to file a motion before the
16 court regarding the status of the case and potential suggestions for proceeding in the
17 future. (Id. at 17.)

18 On November 24, 2003, the Court held another status conference and indicated
19 that it had ordered Barranco to appear with all material pertaining to Petitioner's case.
20 (Doc. No. 239-2 at 27, Ex. L to Reply.) The Court noted that Barranco had not appeared,
21 but the Court received a fax from Barranco a few minutes prior to the scheduled start of
22 the hearing. (Id. at 29.) In the fax, Barranco indicated that she did not receive notice of
23 the August 28, 2003 order to show cause hearing until provided notice by co-counsel on
24 September 9, 2003. Barranco asked the Court to continue this hearing, explaining that
25 she had been going through child custody issues since June 2003, and that there was a
26 hearing that morning on an emergency motion she had made in that matter. (Id. at 29-
27 30.) Barranco stated that she needed to retain the files on the Roybal case, as she
28 remained counsel of record in state court, and indicated plans to check with the Court's
29 clerk after the family court hearing. (Id. at 30.) In response, the Court trailed the status
30 hearing to the afternoon and had a message to that effect sent to the fax number on
31 Barranco's letter, but Barranco failed to respond to the message or contact chambers.
32 (Id. at 33.)

1 At a December 3, 2003 status conference, Babcock stated that he still had no
2 contact with Barranco and was concerned about the looming December 11, 2003
3 deadline to file the state habeas petition, as well as the status of any documents in her
4 possession. (Doc. No. 239-2 at 40-41, Ex. M to Reply.) The Court and counsel also
5 discussed the possibility of successor counsel and potential time and financial
6 considerations. (Id. at 42-46.) The Court issued an OSC for Barranco and set a date for
7 December 16 for her to appear. (Id. at 47.) Babcock indicated that he had contacted
8 counsel for Respondent to apprise her of the situation. (Id. at 48.)

9 Barranco appeared at the December 16, 2003 hearing, where the Court indicated
10 that the primary concern was securing and preserving case materials in her possession.
11 (Doc. No. 239-2 at 61-62, Ex. N to Reply.) Barranco stated that, “No physical evidence
12 that I know of was lost or destroyed,” and said she believed only paper transcripts had
13 been lost. (Id. at 62.) Barranco also indicated a need for the materials in order to
14 complete the state habeas petition, as she remained counsel of record in that matter. (Id.
15 at 62-63.) Barranco said that there were 30 boxes in the beginning, and she presently
16 had about 12. (Id. at 65.) The Court ordered Barranco to transfer all remaining files in
17 her possession to Babcock by the end of the month of December, in order to ensure the
18 security of those materials. (Id. at 70-74.)

19 At a January 6, 2004 hearing, Barranco appeared by phone and indicated that over
20 two meetings in December, she had turned over all files in her possession to Mr. Stevens,
21 an investigator employed by Babcock. (Doc. No. 239-2 at 81, Ex. O to Reply.) Stevens
22 stated that he had traveled to her home nine times total, went through disorganized
23 materials in her garage with her, and while he believed he had all of the relevant files
24 from the garage, he “can’t be certain because some of the material was rather
25 disorganized and in a condition that couldn’t be easily read.” (Id. at 85-86.) Stevens
26 stated that the materials he obtained would probably fill about 10 boxes. (Id. at 90.)
27 Barranco stated that she did not have any case materials on her computer that Babcock
28 did not already have copies of. (Id. at 92.) The Court and counsel discussed possibilities

1 for record reconstruction and the posture of the state case. (Id. at 95-101.) Respondent
2 again articulated that “this Court has a fully exhausted pending petition before it and a
3 case that can and should be decided.” (Id. at 102.) The Court ordered another status
4 conference to allow time for an inventory of the remaining case materials. (Id.)

5 The Court held another status conference on February 6, 2004, for further
6 discussions on the status of the record, efforts at reconstruction, and the possibility of
7 appointing successor federal habeas counsel. (Doc. No. 239-2, Ex. P to Reply.) With
8 respect to Barranco’s prior representations that the filing of a state habeas petition had
9 been imminent, Babcock stated that the inventory of materials did not reveal drafts of
10 anything, and that “we’re in one of two situations right now. We’re either in a situation
11 where those representations were not true, or we’re in a situation in which the material
12 was in fact in a draft form and it was destroyed; and I’m not aware of which of those two
13 possibilities is the situation.” (Id. at 125.) After further discussions on possibilities for
14 proceeding, the Court stated that, “[w]hat has happened in this case is unfortunate and
15 represents perhaps the most bizarre set of circumstances I’ve ever seen in any case,
16 whether civil or criminal, since I’ve been on either bench.” (Id. at 134.) The Court
17 opined that it “it doesn’t seem to me, given the history of this case and the difficulties
18 counsel have had, possible for counsel to continue either with the state matter or the
19 federal matter. Seems to me that it would be appropriate for counsel to withdraw at this
20 point, but to let new counsel come in and start fresh.” (Id.)

21 Respondent again noted that “we would like to reiterate or object or lodge our
22 objection, again, as I think we’ve stated all along and been consistent, we feel that there
23 is a fully exhausted petition before this Court which this Court can decide.” (Id. at 135.)
24 The Court noted that either route - whether proceeding on the federal petition as
25 currently constituted, or staying the federal action so a state petition could be filed and
26 then integrated into the federal petition - would involve a significant length of time, and
27 inquired who would represent Petitioner if the Court chose to follow Respondent’s
28 proposed course of action. (Id. at 137-38.) The Court noted that current federal and state

1 counsel intended to withdraw, and prospective counsel noted that Respondent's option
2 would "be a death blow" to their entry into Petitioner's case, as it would present "an
3 impossible situation." (Id. at 139-40.) The Court indicated that "as a practical matter we
4 need to give new counsel an opportunity to get into the case" and "that even if we were
5 to go down the path that you have suggested, that is, proceeding on the petition, we are
6 in a perilous situation." (Id. at 142.) The Court then stated:

7 Knowing what I know obviously about the status of present counsel, I
8 simply think it would be a gross injustice to force Mr. Babcock at this point
9 to proceed in light of the history of this case and fundamentally unfair to the
10 petitioner. That is my reaction at first blush. [¶] I know what the position
11 of the a [sic] AG's office is in cases like this. It seems to me that there must
12 be some discretion available to the office in exceptional cases to in a sense
13 show some understanding and patience, and perhaps agree that the best
14 policy may not be to forge ahead with what would be in this case the
15 petition that's currently filed with this Court. It seems that if there is any
16 discretion to be exercised, that this would be a case demanding that
17 discretion.

18 (Id. at 142-43.) The Court indicated that if Respondent could not countenance what the
19 Court was contemplating, Respondent may be able to seek relief or a ruling from the
20 Ninth Circuit. (Id. at 143.) The Court indicated that "at this time my inclination would
21 certainly be to continue to proceed along the lines of allowing the state habeas
22 proceedings to come to a completion prior to proceeding with the merits of the federal
23 habeas petition." (Id. at 151.)

24 On March 12, 2004, attorneys John Lanahan and Elizabeth Missakian were
25 conditionally appointed as federal habeas counsel, subject to their concurrent
26 appointment as state habeas counsel. (Doc. No. 239-2, Ex. Q to Reply.) On July 1,
27 2004, Babcock moved to withdraw as state habeas counsel and on August 30, 2004,
28 Lanahan and Missakian moved for appointment as state habeas counsel. On September
29, 2004, the California Supreme Court removed Barranco as state habeas counsel, and
the state supreme court also noted that "Barranco is hereby referred to the State Bar of
California for appropriate disciplinary proceedings in light of her abandonment of her
condemned client." (Case No. S029453 at <http://www.courts.ca.gov/supremecourt.htm>.)
Also on September 29, 2004, the California Supreme Court granted Babcock permission

1 to withdraw as counsel, and appointed Lanahan and Missakian as state habeas counsel.
2 On October 29, 2004, the Court converted the conditional appointment of Lanahan and
3 Missakian to an unconditional appointment and relieved Babcock of further
4 representation in Petitioner's federal habeas case.

5 The First Amended Petition contains a detailed account of current counsels'
6 actions in attempting to recover and reconstruct the trial files and record in Petitioner's
7 case. For instance, counsel contacted the trial prosecutor for a copy of trial discovery,
8 and completed review of that material by December 2004. (Doc. No. 215-3 at 18, citing
9 Ex. 33 to FAP.) Counsel for Respondent provided a copy of the appellate record
10 pursuant to the Court's July 26, 2004 order, which took several months to review and
11 annotate after completing review of the trial discovery. (Ex. 33 to FAP at 8-9.)

12 Starting in April 2005, Missakian began a review of the recovered files received
13 by Babcock and Barranco, and as stated in the First Amended Petition:

14 The review of the boxes and their contents was an extraordinarily difficult
15 task because of their condition. The boxes themselves were moldy and
16 clearly damaged by water. The documents inside the boxes were moldy,
17 malodorous, covered in many cases with animal feces and urine. At one
18 point, when counsel had completed review of about half the boxes, she had
to go to Urgent Care because of an allergic reaction to the mold. She
completed her review of these boxes wearing a surgical mask and had three
fans running in her office to protect against the stench emanating from the
boxes.

19 (Id. at 19, citing Ex. 33 to FAP.) Concurrently, counsel states that they also began a
20 review of boxes sent by the California Appellate Project. (Id.) Counsel also requested
21 copies of requests made by trial counsel under Penal Code section 987.9 in an attempt
22 to identify and contact any experts retained by trial counsel. (Id. at 19-21.) Counsel also
23 contacted numerous correctional and rehabilitative institutions in an attempt to obtain
24 additional records, obtained an additional box of materials from the Office of the Public
25 Defender, an additional box in 2005 from Barranco, some computer files from trial co-
26 counsel Cannon, and additional computer files from paralegal Diana Pickett, who had
27 been retained by Barranco. (Id. at 21-22.)

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1 The state court record reflects that counsel made several requests to unseal
 2 records. On June 29, 2005, the California Supreme Court granted a May 5, 2005 request
 3 for access to sealed trial records. (See Case No. 029453.) On November 15, 2006, the
 4 state court denied a request to unseal requests made by prior state habeas counsel,
 5 without prejudice to renewing the request and providing notice to prior counsel. On
 6 April 18, 2007, the state court granted the request to unseal prior state habeas counsels'
 7 funding requests and status reports.

8 The record also reflects that a discovery hearing was held in San Diego County
 9 Superior Court on March 22, 2007. (Ex. 59 to FAP.) Petitioner states that "the
 10 Honorable William D. Mudd viewed what remained of Mr. Roybal's trial files and found
 11 that twenty to twenty-three boxes had been delivered by Attorney Morris to Attorneys
 12 Barranco and Babcock, and that nine boxes now remained. All of the documents had
 13 been damaged, some worse than others." (Doc. No. 215-3 at 15, citing Ex. 59 to FAP.)

14 On October 1, 2007, counsel filed a state habeas petition in the California Supreme
 15 Court on behalf of Petitioner, in Case No. S156846. On November 13, 2007, this Court
 16 held a status hearing, and counsel for Petitioner inquired whether they should amend the
 17 pending federal Petition at that time or wait until the conclusion of the state habeas
 18 proceedings. (Doc. No. 239-2 at 212, Ex. T to Reply.) After Respondent expressed no
 19 preference, the Court and Petitioner's counsel had the following exchange:

20 The Court: Well, I don't think - - my instinct would be at this point
 21 - - and I'm not ruling on this - -

22 Mr. Lanahan: Right.

23 The Court: - - because you haven't presented it; it's certainly not
 ripe - -

24 Mr. Lanahan: Correct.

25 The Court - - but I think at this point we're looking for judicial
 26 economy, and I would think that perhaps the
 27 appropriate way - - that you're not prejudiced, I don't
 28 see any prejudice by waiting until the California
 Supreme Court acts on this and at that point you file an
 amended petition. Basically we've been holding this
 case in abeyance - -

1 Mr. Lanahan: Right.

2 The Court: - - until you had an opportunity to file a fully integrated
3 petition before the California Supreme Court, giving
4 that Court an opportunity to rule. And so I think your
instinct, Mr. Lanahan, is a sound one at this point, that
it makes sense to hold off, and - -

5 Mr. Lanahan: Okay.

6 The Court: - - if there's an issue that evolves from that, then we'll
7 have to deal with it. I'm not - - I don't want to in any
8 way discourage you from doing the research that you
and Ms. Missakian may feel appropriate on the
question, but that's - -

9 Mr. Lanahan: Okay, Well I - -

10 The Court: - - my off-the-cuff - -

11 Mr. Lanahan: Right.

12 The Court: - - observation.

13 Mr. Lanahan: Okay.

14 The Court: Ms. Boustany?

15 Ms. Boustany: I have nothing really to add.

16 (Id. at 213-14.)

17 On April 28, 2008, Respondent filed an Informal Response to the state habeas
18 petition, and on December 23, 2008, Petitioner filed an Informal Reply. On January 3,
19 2013, the California Supreme Court denied the state habeas petition.

20 On January 17, 2013, this Court held a status hearing and later issued a briefing
21 schedule, setting a deadline for filing the Amended Petition and a Motion for Leave to
22 Amend the Petition, on or before June 17, 2013. On June 17, 2013, Petitioner filed the
23 First Amended Petition. As discussed earlier, after a July 12, 2013 status hearing, the
24 parties agreed upon, and the Court ordered, a revised briefing schedule. Petitioner's
25 Motion for Leave to Amend was filed August 1, 2013. Respondent filed an Opposition
26 on September 16, 2013, and on November 1, 2013, Petitioner filed a Reply.

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II. STATUTORY AND EQUITABLE TOLLING - GENERALLY

Under 28 U.S.C. § 2244(d)(1), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 [“AEDPA”], a state court prisoner has one-year to seek federal habeas corpus relief from a state court judgment. In most cases, this time period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). However, the AEDPA allows that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

The United States Supreme Court has also held that “§ 2244(d) is subject to equitable tolling in appropriate cases.” Holland v. Florida, 560 U.S. 631, ___, 130 S.Ct. 2549, 2560 (2010). To warrant equitable tolling, a habeas petitioner must establish that: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 130 S.Ct. at 2562, quoting Pace v. DiGuglielmo, 644 U.S. 408, 418 (2005). The Ninth Circuit has held that equitable tolling is “unavailable in most cases.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); see Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (“[T]he threshold necessary to trigger equitable tolling (under AEDPA) is very high, lest the exceptions swallow the rule.”) (citation omitted).

“The prisoner must show that the ‘extraordinary circumstances’ were the cause of his untimeliness.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003), quoting Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003). “To apply the doctrine in ‘extraordinary circumstances’ necessarily suggests the doctrine’s rarity, and the requirement that extraordinary circumstances ‘stood in his way’ suggests that an external force must cause the untimeliness, rather than, as we have said, merely ‘oversight, miscalculation or negligence on (the petitioner’s) part, all of which would preclude the

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1 application of equitable tolling.” Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011
 2 (9th Cir. 2009), quoting Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir. 2008).

3 “Grounds for equitable tolling under § 2244(d) are ‘highly fact-dependent.’” Laws
 4 v. Lamarque, 351 F.3d 919, 922 (9th Cir. 2003), quoting Whalem/Hunt v. Early, 233
 5 F.3d 1146, 1148 (9th Cir. 2000) (en banc); see also Doe v. Busby, 661 F.3d 1001, 1011
 6 (9th Cir. 2011) (“Like any equitable consideration, whether a prisoner is entitled to
 7 equitable tolling under AEDPA will depend on a fact-specific inquiry by the habeas
 8 court which may be guided by ‘decisions made in other similar cases.’”), quoting
 9 Holland, 130 S.Ct. at 2563.

10 **III. DISCUSSION**

11 Here, the United States Supreme Court denied the petition for writ of certiorari on
 12 October 4, 1999, at which time Petitioner’s judgment of conviction was finalized. See
 13 28 U.S.C. § 2244(d)(1)(A). As noted above, Barry Morris, who was appointed to
 14 represent Petitioner on his direct appeal and state habeas proceedings, did not file a state
 15 habeas petition, and on October 5, 1999, Petitioner filed a motion for appointment of
 16 counsel in this Court. On December 14, 1999, Elizabeth Barranco and Russell Babcock
 17 were appointed as federal habeas counsel.

18 In the absence of equitable or statutory tolling, Petitioner’s limitations period
 19 under AEDPA expired on October 3, 2000. While prior federal habeas counsel timely
 20 filed a federal petition on September 29, 2000, containing only the exhausted claims
 21 previously presented on direct review, as directed by this Court, the filing of a federal
 22 petition does not toll the statute of limitations. Duncan v. Walker, 533 U.S. 167, 172
 23 (2001); King v. Ryan, 564 F.3d 1133, 1141 (9th Cir. 2009). The Amended Petition,
 24 which was filed on June 17, 2013, is therefore only timely if equitable and/or statutory
 25 tolling is available in Petitioner’s situation.

26 Petitioner asserts that prior state and federal habeas counsel Barranco’s failure to
 27 comply with professional standards of care in her representation of Petitioner, her
 28 “deliberate misrepresentation of her efforts” to Petitioner and to the Court, as well as co-

1 counsel Babcock’s failure to monitor her activity and misrepresentations regarding his
2 observations on Barranco’s lack of progress on the state petition, “justify equitable
3 tolling of the delay from the appointment of attorneys Barranco and Babcock in 1999,
4 to the denial of the state petition in case number S156846 on January 3, 2013.” (Reply
5 at 25-26.) Respondent maintains that Petitioner cannot establish entitlement to equitable
6 tolling, either through the implication that he was misled by the Court’s reference to a
7 stay-and-abey order, as Petitioner failed to request or procure any such order, or on the
8 basis of attorney misconduct, as Petitioner fails to show that he exercised the necessary
9 reasonable diligence. (Opp. at 13-14.)

10 **A. Petitioner’s Entitlement to Equitable and/or Statutory Tolling**

11 The United States Supreme Court has allowed that “at least sometimes,
12 professional misconduct . . . could . . . amount to egregious behavior and create an
13 extraordinary circumstance that warrants equitable tolling.” Holland, 130 S.Ct. at 2563.
14 The Ninth Circuit has also indicated on numerous occasions that equitable tolling may
15 be available in cases involving misconduct of habeas counsel. In Spitsyn, despite the
16 fact that habeas counsel “was hired nearly a full year in advance of the deadline,
17 [counsel] completely failed to prepare and file a petition.” Id., 345 F.3d at 801. This
18 was in addition to the fact that petitioner and his mother contacted counsel numerous
19 times, to no avail, and the petitioner requested the return of his files, which the attorney
20 kept until two months after the limitations period expired. Id. In Doe, the Ninth Circuit
21 found habeas counsel’s performance constituted “extraordinary circumstances” in a case
22 where the petitioner hired an attorney to file his federal petition, paid counsel \$20,000
23 in advance and provided counsel with his files, yet, “Not only did the attorney not file
24 a timely petition, he filed no petition at all, in spite of his numerous promises to the
25 contrary. When Doe eventually sought his files from his attorney, the attorney took six
26 months to return them.” Id., 661 F.3d at 1012.

27 As noted above, a “fact-specific inquiry” is required to determine whether
28 equitable tolling is appropriate. Spitsyn, 345 F.3d at 799. In this case, the record is

1 replete with evidence that Petitioner was not only abandoned by his first state habeas
2 counsel, but that successor state/federal habeas counsel's misrepresentations, failures,
3 and actions, which allowed the destruction of Petitioner's case files, constituted
4 egregiously deficient performance. The Ninth Circuit has held that "attorney misconduct
5 that is sufficiently egregious to meet the extraordinary misconduct standard can be a
6 basis for applying equitable tolling." Porter v. Ollison, 620 F.3d 952, 959 (9th Cir.
7 2010), citing Spitsyn, 345 F.3d at 801.

8 It is clear that as early as 1998, Petitioner attempted to raise his concerns about
9 state habeas counsel's failure to communicate and failure to send Petitioner copies of
10 documents filed on his behalf. (See Doc. No. 25 at 148-49, Ex. to Decl. of Barranco).
11 In August 1999, the record reflects that Petitioner sent a letter to the California Supreme
12 Court "to express some serious concerns" about state counsel Barry Morris, indicating
13 that he had been informed by an attorney with the California Appellate Project that Mr.
14 Morris "has abandoned my case," and stated: "I respectfully request that this letter be
15 filed with the record in my case. I further request that this Court investigate this matter
16 for me because I know nothing about the law, and I need a competent lawyer to represent
17 me." (Id. at 150.) While Morris, in a March 2000 motion to withdraw as counsel,
18 indicated that he made the decision to withdraw as state habeas counsel in March 1999,
19 the record does not reflect if or when he informed Petitioner of this decision. (Doc. No.
20 25 at 168-69, Ex. to Decl. of Babcock.)

21 Petitioner's request for the appointment of federal habeas counsel was filed on
22 October 5, 1999, one day after his conviction was finalized, and indicated that "[t]he
23 attorney who represented me in state court proceedings, Barry Morris of Hayward,
24 California, has advised me that he is not available to represent me in these federal habeas
25 proceedings." (Doc. No. 2 at 3.) Babcock and Barranco each attached declarations to
26 the petition filed on September 29, 2000, detailing Morris' lack of action on Petitioner's
27 state habeas case, stating that they were unaware of Morris' lack of progress prior to their
28 appointment to the federal case, recounting their efforts to be appointed as state habeas

1 counsel, and outlining issues regarding the minimal amount of funding that remained
 2 available for state habeas work, as well as noting that their prior requests for
 3 appointment at the state level had been denied. (See Doc. No. 25 at 140-47, 153-59.)

4 It is also clear that a capital habeas petitioner is statutorily entitled to the
 5 appointment of counsel to assist him in the development and preparation of his federal
 6 habeas petition.⁴ See Calderon v. United States Dist. Court for the Central Dist. of Cal.
 7 (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (en banc), abrogated on other grounds by
 8 Woodford v. Garceau, 538 U.S. 202, 206 (2003); see also McFarland v. Scott, 512 U.S.
 9 849, 859 (1994) (in which the Supreme Court held that in establishing 21 U.S.C. §
 10 848(q), which “provid[ed] indigent capital defendants with a mandatory right to qualified
 11 legal counsel in these [habeas] proceedings, Congress has recognized that federal habeas
 12 corpus has a particularly important role to play in promoting fundamental fairness in the
 13 imposition of the death penalty.”); see also 18 U.S.C. § 3599.⁵ In McFarland, the
 14 Supreme Court stated that “the right to counsel necessarily includes a right for that
 15 counsel meaningfully to research and present a defendant’s habeas claims.” Id., 512 U.S.
 16 at 858. Similarly, in California, a capital prisoner has a codified right to counsel for their
 17 state postconviction proceedings. See Cal. Gov. Code § 68662.

18 Not only does the record show that prior state habeas counsel Morris abandoned
 19 Petitioner’s case and failed to file a state habeas petition, but the record reflects that

21 ⁴ In Frye v. Hickman, the Ninth Circuit explicitly distinguished capital cases from
 22 non-capital cases, explaining that in capital habeas cases, an indigent petitioner has a
 23 statutory right to counsel, and therefore the “dereliction of his appointed counsel made
 it impossible for the petitioner to file the petition he was statutorily entitled to file.”
Frye, 273 F.3d 1144, 1146 (9th Cir. 2001).

24 ⁵ 18 U.S.C. § 3599 (which in 2005 recodified 21 U.S.C. § 848(q)) reads, in part,
 as follows:

- 25 (2) In any post-conviction proceeding under section 2254 or 2255 of title 28,
 26 United States Code, seeking to vacate or set aside a death sentence, any
 27 defendant who is or becomes financially unable to obtain adequate
 28 representation or investigative, expert, or other reasonably necessary
 services shall be entitled to the appointment of one or more attorneys and
 the furnishing of such other services in accordance with subsections (b)
 through (f).

1 successor state habeas counsel Barranco, who concurrently served as federal habeas
2 counsel, also failed in her responsibility to Petitioner. Both Morris and Barranco failed
3 to properly communicate with Petitioner and update him on the status of his case, as
4 evidenced by Petitioner's letters to the state and federal courts. Barranco averred to the
5 federal court at several points that she was close to filing a state habeas petition, even
6 though such statements were later found to be untrue. Moreover, as discussed in detail
7 above, Barranco had possession of Petitioner's case files and record and failed to secure
8 those files, allowing for their destruction. Barranco also failed to keep the Court and co-
9 counsel apprised of the status of the case, or to timely respond to this Court's orders,
10 including those aimed at securing the remainder of Petitioner's files. See Holland, 130
11 S.Ct. at 2564 ("A group of teachers of legal ethics tells us that these various failures
12 violated fundamental canons of professional responsibility, which require attorneys to
13 perform reasonably competent legal work, to communicate with their clients, to
14 implement clients' reasonable requests, to keep their clients informed of key
15 developments in their cases, and never to abandon a client.")

16 In addition to Barranco's 2004 removal as counsel in both Petitioner's state and
17 federal case, and her referral to the State Bar for disciplinary proceedings, she was
18 ordered to reimburse the California Supreme Court "the sum of \$20,250, subject to her
19 ability to demonstrate to the court that she should be credited, as appropriate, for habeas
20 corpus 'work performed that is determined by the court to be of value to the court.'" (Case No. S029453 at <http://www.courts.ca.gov/supremecourt.htm>.) Additionally, in
21 2006, the State Bar of California suspended Barranco from the practice of law due to
22 misconduct and violations of professional responsibilities with respect to a number of
23 clients, including Petitioner. (Ex. 53 to FAP.) Specifically, the State Bar Court
24 concluded that:
25

- 26 131. By failing to take any legal action or perform any work on Roybal's
27 behalf after September 17, 2003, Respondent willfully violated Rules
28 of Professional Conduct, rule 3-110(A).

1 132. By moving her office without informing Roybal of her whereabouts;
 2 by not informing Roybal that she would not be completing the legal
 3 services for which she was appointed; by not promptly withdrawing
 4 from her representation of Roybal; and by not promptly releasing
 5 Roybal's file, Respondent failed to take reasonable steps to avoid
 reasonably foreseeable prejudice to the rights of a client, including
 giving due notice to the client and complying with Rule 3-700(D), in
 willful violation of Rules of Professional Conduct, Rule 3-700(A)(2).

6 (Id. at 26.) On June 3, 2007, Barranco was disbarred from the practice of law in
 7 California, in part, due to similar types of misconduct as in Petitioner's case, including
 8 a failure to turn over client files. (See Ex. 55 to FAP at 13); see Porter, 620 F.3d at 961
 9 ("It has been held that a habeas petitioner represented by an attorney who was disbarred
 10 (or resigned the bar) for the same type of conduct as in the petitioner's case and required
 11 to return his fee was engaged in egregious conduct that constitutes extraordinary
 12 circumstances beyond attorney negligence."), citing Spitsyn, 345 F.3d at 798; see also
 13 Holland, 130 S.Ct. at 2568 (Alito, J., concurring) ("Common sense dictates that a litigant
 14 cannot be held constructively responsible for the conduct of an attorney who is not
 15 operating as his agent in any meaningful sense of that word.") Given the ample showing
 16 of prior appointed counsels' unprofessional behavior and misconduct, it is apparent that
 17 "extraordinary circumstances" are present in Petitioner's case that prevented the timely
 18 filing of the newly exhausted claims in federal court within one year of the conclusion
 19 of direct review.

20 The Court also finds that Petitioner has acted diligently in pursuing his rights. See
 21 Doe, 661 F.3d at 1012-13 ("The purpose of requiring a habeas petition to show diligence
 22 is to verify that it was the extraordinary circumstance, as opposed to some act of the
 23 petitioner's own doing, which caused the failure to timely file."), citing Roy v. Lampert,
 24 465 F.3d 964, 973 (9th Cir. 2006), Spitsyn, 345 F.3d at 802. As the Court previously
 25 noted, Petitioner sent a letter to the California Supreme Court in 1998, prior to the
 26 finalization of his conviction, pleading for their assistance after learning that his state
 27 habeas counsel intended to abandon his case. Petitioner requested the appointment of
 28 federal habeas counsel on October 5, 1999, only one day after his petition for writ of

1 certiorari was denied by the California Supreme Court. The record also reflects a
2 number of status conferences between January and April 2003 in which the Court and
3 counsel for Petitioner discussed communication problems between counsel and
4 referenced communication problems with Petitioner. Additionally, when Petitioner later
5 learned that Babcock had been removed as counsel in May 2003, he promptly wrote to
6 alert this Court to issues surrounding Barranco's representation, including the conflict
7 between himself and counsel, her failure to update him on the status of his case, and that
8 she instead shared with him her own personal issues. As detailed above, the record also
9 makes clear that current counsel has worked diligently to recover and reconstruct the
10 record since their appointment to the case in September 2004, including contacting a
11 large number of individuals involved in Petitioner's trial and appellate proceedings in
12 attempts to obtain any documents in their possession, cataloging the files recovered from
13 prior counsel and the other individuals, and pursuing discovery matters and other records
14 in the trial court, state supreme court, and in this Court.

15 Moreover, as the relevant statutes discussed above make clear, a capital petitioner
16 is entitled to the assistance of counsel during both state and federal habeas proceedings.
17 See 18 U.S.C. § 3599; Cal. Gov. Code § 68662. The record demonstrates that Petitioner
18 diligently attempted to exercise these rights and that the actions, failures, and misconduct
19 of prior state habeas and federal habeas counsel, which was entirely beyond the control
20 of Petitioner, severely obstructed his ability to exhaust his state habeas claims and file
21 a comprehensive federal habeas petition within the AEDPA limitations period.
22 Therefore, the Court finds that equitable tolling is warranted in this case.

23 Petitioner requests that the Court equitably toll the limitations period starting from
24 the appointment of Barranco and Babcock on December 14, 1999, to the denial of the
25 state petition on January 3, 2013. (Reply at 25-26.) Given the circumstances of this case
26 and the egregious conduct of prior counsel, some measure of equitable tolling is
27 warranted. Petitioner's request to equitably toll the statute of limitations starting on
28 December 14, 1999 appears reasonable.

1 However, it also appears reasonable that the grant of equitable tolling shall only
2 extend to the date that the state habeas petition was filed, October 1, 2007. As discussed
3 above, section 2244(d)(2) allows for suspension of the limitations period when a
4 “properly filed application for State post-conviction or other collateral review with
5 respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Here,
6 it appears that the state habeas petition was properly filed. Indeed, counsel for Petitioner
7 indicated in 2006 that under California Supreme Court rules, a state habeas petition filed
8 within 36 months of their appointment to the case would be considered presumptively
9 timely. (See Doc. No. 185 at 8.) Again, current counsel was appointed to represent
10 Petitioner on state habeas on September 29, 2004, and the state habeas petition was filed
11 on October 1, 2007. In light of the grant of equitable tolling, which begins on December
12 14, 1999, about two and a half months after the AEDPA statute of limitations began to
13 run, the state habeas petition was filed well within the limitations period. Therefore,
14 Petitioner warrants statutory tolling for the time the state habeas petition was pending
15 in state court, from October 1, 2007 to January 3, 2013. As the AEDPA limitations
16 period again began to run after the denial of the state habeas petition, and Petitioner filed
17 the Amended Petition on June 17, 2013, about five and a half months after the
18 conclusion of those proceedings and after less than eight months had elapsed from the
19 limitations period, the Amended Petition is timely.

20 **B. Court’s Prior Statements and Ruling on Equitable Tolling**

21 Because the Court concludes that Petitioner is entitled to equitable tolling due to
22 the misconduct of prior habeas counsel, and statutory tolling for the time the state habeas
23 petition was pending in the California Supreme Court, the Court need not address
24 whether its prior remarks about stay and abeyance could have “misled” Petitioner or
25 would alternately serve to permit equitable tolling. Moreover, Petitioner avers that
26 “counsel were not misled by the Court which was clear about the status of the federal
27 petition pending review of the state petition by the California Supreme Court.” (Reply
28 at 26.)

1 The Court agrees that it has consistently and repeatedly articulated that the most
2 efficient and effective way to handle the instant case - at first, given the abandonment
3 by the original state habeas counsel, and then later, in light of the problems engendered
4 by the actions, or lack thereof, of federal and successor state habeas counsel - was to wait
5 to proceed with the federal petition until after the state habeas proceedings had
6 concluded and this Court had before it a comprehensive petition.

7 At a February 25, 2000 hearing, prior to the filing of the original federal petition,
8 the Court, after directing federal counsel to file a petition containing only the previously
9 exhausted claims, stated that “then on other claims that are being processed through the
10 state system and become exhausted, they may be incorporated into the petition as those
11 claims become viable in the federal system.” (Doc. No. 239-1 at 6, Ex. A to Reply.)
12 Then, as stated above, at the June 30, 2000 hearing, the Court directed Petitioner to file
13 a federal petition containing only the previously-exhausted claims and indicated that it
14 would stay the federal case if necessary. (Doc. No. 239-1 at 63, Ex. C. to Reply.)
15 Accordingly, the September 29, 2000 Petition entitled “First Petition for Writ of Habeas
16 Corpus By State Death Row Inmate As To Claims Previously Exhausted In State Court;
17 Evidentiary Hearing Requested” included a footnote which read in part that, “[p]ursuant
18 to the ruling of this Court on June 30, 2000, petitioner alleges herein only those claims
19 previously exhausted in the courts of the State of California. Petitioner intends to file
20 a subsequent petition in this court should claims which have not yet been adjudicated in
21 the courts of the State of California be denied in that forum.” (Doc. No. 25 at 1 fn. 1.)

22 After the initial Petition was filed and briefed, Respondent repeatedly advocated
23 for the Court to proceed with adjudicating that petition, and the Court repeatedly
24 declined to accede to those requests, repeatedly indicating an intention to wait until the
25 conclusion of the state habeas proceedings and the filing of a comprehensive federal
26 petition. For example, at an October 24, 2001 hearing, the Court noted that, “although
27 Ms. Boustany [counsel for Respondent] has certainly had her separate responsibility in
28 this case to see this Court moving ahead just as quickly as she wanted to move with

1 respect to the filed petition with the claims in that petition, I think ultimately this is the
2 best road to go down. The anticipated state petition is certainly on the horizon at this
3 point. Whatever action the California Supreme Court takes will either afford the
4 petitioner relief or allow this Court to proceed with the petition before it as augmented
5 or supplemented by any exhausted claims after the Supreme Court has acted.” (Doc. No.
6 239-1 at 171-72, Ex. F to Reply.) Again, at a September 17, 2003 status hearing on
7 issues surrounding Barranco’s representation, the Court again noted that; “Another factor
8 I need to get some clarification on would be the progress of the state case. Now, as you
9 know, this is a case where in essence the tail wags the dog. The federal habeas petition
10 cannot proceed before the state petition is perfected. . .”. (Doc. No. 239-1 at 216, Ex. J
11 to Reply; see also Doc. No. 239-2 at 12-13, Ex. K to Reply (October 23, 2003 hearing
12 in which Court stated that: “I think for our purposes, that is, the purpose of this Court,
13 it is going to be important to get some reliable information about what’s happening with
14 the state petition, what is the state likely to do at this point, what is the Supreme Court
15 going to do, you know, because in a sense, the state petition has always controlled the
16 circumstances, the timing, of the federal habeas going forward.”)).

17 After Petitioner filed the state habeas petition in October 2007, the Court again
18 indicated an inclination to hold off on the resumption of federal proceedings until the
19 conclusion of any pending state habeas proceedings, stating that, “Basically, we’ve been
20 holding this case in abeyance . . . until [Petitioner] had an opportunity to file a fully
21 integrated petition before the California Supreme Court, giving that Court an opportunity
22 to rule.” (Doc. No. 239-2 at 213, Ex. T to Reply.) The Court stated that, “I don’t see any
23 prejudice by waiting until the California Supreme Court acts on this and at that point you
24 file an amended petition.” (Id.) Moreover, as Petitioner points out, the state record
25 reflects that Respondent also operated under the view that the initial petition was stayed
26 in federal court during the pendency of the state proceedings. (Reply at 19.) In the
27 Informal Response to the state habeas petition, Respondent stated that, “Roybal has a
28 pending habeas proceeding in the United States District Court, *Roybal v. Ayers*, case

1 number 99CV 2152-JM, which is presently stayed pending Roybal's exhaustion of his
2 state remedies in this Court." (Lodgment No. 140 at 4.)

3 As a related matter, Petitioner's prior motion for equitable tolling is
4 distinguishable from the instant situation. On June 16, 2000, prior federal counsel
5 moved to toll the AEDPA deadline in light of the delay in appointing federal counsel,
6 the fact that they did not receive the files until a month after their appointment to the
7 case, and the disorganized state of the files received. (Doc. No. 19.) At the June 30,
8 2000 hearing, the Court denied the motion for equitable tolling, premised on the
9 understanding that the petition to be filed by October 2000 would only include exhausted
10 claims. (See Doc. No. 239-1, Ex. C to Reply at 63-65.) As the Court clearly stated:

11 It seems to me that - - and I say this now with some understanding as to
12 what the Roybal case consists of, having read the opinion and being aware
13 of the underlying procedural and substantive history, that in fact a federal
14 habeas petition may be filed by October of this year, an exhausted petition,
15 and that is what I am - - that is what I am suggesting, that it is not necessary
16 for counsel in connection with the federal case, to peruse and master
17 500,000 pages of investigatory material, if that is what is there, prior to the
18 filing of an exhausted federal habeas petition in this case.

19 I think that's the manner in which this case should proceed, that there
20 should be a filing of an exhausted habeas petition, that counsel at that point,
21 if they need to put a substantial amount of their focus and attention on
22 what's happening with the state petition, that they can turn their efforts in
23 that direction, deal with the California Supreme Court, seek compensation
24 there; but at least you'll have an exhausted petition on file here.

25 (Id. at 65.)

26 Thus, it is evident that the prior request for equitable tolling solely concerned the
27 time limitation for filing the original petition containing only exhausted claims, and did
28 not contemplate the filing of a comprehensive federal petition. Moreover, given that the
prior request was made early in the pendency of the federal case and prior to the
misconduct and attendant events detailed above, it does not bear on the Court's present
decision to grant equitable tolling based on the misconduct of prior counsel.

29 **C. Request for Leave to Amend Petition and Procedural Contentions**

30 Because Petitioner is entitled to equitable and statutory tolling and the Amended
Petition was filed before the statute of limitations had run, the new claims need not relate

1 back to the date of the original Petition, and are not governed by Rule 15(c) of the
2 Federal Rules of Civil Procedure. Contrast Mayle v. Felix, 545 U.S. 644, 655
3 (“Amendments made *after* the statute of limitations has run relate back to the date of the
4 original pleading if the original and amended pleadings ‘ar(i)se out of the conduct,
5 transaction, or occurrence.’ Rule 15(c)(2)”) (emphasis added.) As such, Rule 15(a) states
6 that in cases in which a responsive pleading has been filed, “a party may amend its
7 pleading only with the opposing party’s written consent or the court’s leave. The court
8 should freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2). A responsive
9 pleading, the Answer, has been filed and Respondent has declined to give consent to
10 amendment. (See Doc. No. 26; Opp. at 9.) As such, leave of this Court is required for
11 amendment.

12 “Although, under [Rule 15(a)], ‘leave shall be freely given when justice so
13 requires,’ the district court may consider whether there is any evidence of ‘undue delay,
14 bad faith or dilatory motive’ with respect to the filing of the amendment when
15 determining whether leave should be granted.” Anthony v. Cambra, 236 F.3d 568, 577
16 (9th Cir. 2000), quoting Foman v. Davis, 371 U.S. 178, 182 (1962). The Supreme Court
17 has also instructed that the district court should consider other factors including
18 “repeated failure to cure deficiencies by amendments previously allowed, undue
19 prejudice to the opposing party by virtue of allowance of the amendment, [and] futility
20 of amendment” in determining whether to grant leave to amend. Id.; see also Bonin v.
21 Calderon, 59 F.3d 815, 844-45 (9th Cir. 1995) (applying Rule 15(a) to amendment of a
22 habeas petition). “The party opposing amendment bears the burden of showing any of
23 the factors above.” Ortegoza v. Kho, 2013 WL 2147799, *6 (S.D.Cal. May 16, 2013),
24 citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). “Absent
25 prejudice, or a strong showing of any of the remaining Foman factors, there exists a
26 *presumption* under Rule 15(a) in favor of granting leave to amend.” Eminence Capital,
27 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis in original).

28 ///

1 The Court finds no indication of undue delay, bad faith, dilatory motive, or
2 failures of prior amendments, as it is evident that present counsel have proceeded in a
3 diligent manner in reconstructing Petitioner's trial and appellate files, preparing and
4 filing the state habeas petition in a timely manner, and returning to federal court with a
5 comprehensive First Amended Petition after the conclusion of the state proceedings. The
6 Court also finds no undue prejudice to the opposing party, as Respondent has been aware
7 of the substance of the claims contained in the amendment since at least October 2007,
8 when the state habeas petition was filed in the California Supreme Court.

9 Respondent also asserts that Petitioner should be denied leave to amend with
10 respect to Claims 13, 23, 24 and 33 due to futility, as those claims are procedurally
11 defaulted, and argues that "[t]he futility of amendment is also evident because habeas
12 relief will be foreclosed by the relitigation bar of 2254(d)" as to each of the twenty-six
13 new claims in the Amended Petition. (Opp. at 19-24.) With respect to Respondent's
14 assertion of a state procedural bar, Petitioner maintains that he has also raised a claim of
15 ineffective assistance of appellate counsel for failing to raise the ostensibly defaulted
16 claims, and argues that "[f]urther briefing on these issues is therefore necessary to
17 determine if the failure of appellate counsel to raise these four claims is sufficient cause
18 and prejudice to allow this Court to review these claims despite the procedural bar
19 indicated by the California Supreme Court." (Reply at 39.) Petitioner also asserts that
20 "Respondent's claim for global preclusion of review of the claims raised in the amended
21 [sic] overstates the deference to the state court even under the objectively unreasonable
22 standard of review," and notes that the Supreme Court has granted habeas corpus relief
23 under this standard of review on claims factually similar to those contained in the
24 amended petition. (Id. at 40.)

25 An amendment may be futile where the claim in question are unexhausted,
26 untimely, procedurally defaulted, or where the legal basis for the claim is tenuous. See
27 Caswell v. Calderon, 363 F.3d 832, 837-39 (9th Cir. 2004). "Futility of amendment can,
28 by itself, justify the denial of a motion for leave to amend." Bonin, 59 F.3d at 846.


1 Here, Respondent fails to satisfy the burden of showing that amendment is futile. While
2 Respondent alleges the existence of a procedural bar as to four of the claims in the
3 amended petition and asserts that Petitioner cannot overcome that bar, Petitioner has
4 alleged the existence of cause and prejudice. Moreover, while Respondent generally
5 asserts that Petitioner will be unable to surmount the “relitigation bar” of section
6 2254(d), he fails to offer any specific argument as to why habeas relief is foreclosed on
7 each of the twenty-six new claims in the amended petition. Accordingly, in light of the
8 acknowledged presumption in favor of granting leave to amend, and because the Court
9 remains unpersuaded that amendment would be futile, Petitioner’s motion for leave to
10 amend is **GRANTED** without prejudice to Respondent to raise available affirmative
11 defenses to the claims contained in the First Amended Petition.

12 **IV. CONCLUSION**

13 For the reasons discussed above, Petitioner’s Motion for Leave to File a First
14 Amended Petition is **GRANTED**.

15 **IT IS SO ORDERED.**

16 DATED: December 16, 2013

17 
18 Hon. Jeffrey T. Miller
United States District Judge